United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL **76-7042**

To be argued by
SEYMOUR D. LEWIS

United States Court of Appeals

For the Second Circuit

B

TAXI WEEKLY, INC.,

Plaintiff-Appellee,

against

P/S

METROPOLITAN TAXICAB BOARD OF TRADE, INC., HOSYND PUBLICATIONS, INC., JACK PLOTSKY, ESTATE OF MORRIS HEIT, ESTATE OF GEORGE MCINTYRE, ALFRED ZEFF, MORRIS LEFKOWITZ, MILTON MARKS, LEON MURSTEIN, GERALD NAREN, IRA SUCHMAN, LEONARD SCHAFFRAN and BENJAMIN BOTWINICK,

Defendants-Appellants,

and

TAXICAB BUREAU, INC., EMPIRE TAXI [illegible] INDEPENDENT TAXICAB OWNERS GUILD, [illegible] TAXI OWNERS GUILD, INC., SALVATORE BARON, [illegible] OF ALFRED J. MARKS and ESTATE OF NATHAN LEVINE,

Defendants.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

Defendants-appellants (other than Botwinick) submit this reply brief (1) to correct certain of the more significant factual overstatements and factual omissions of appellee's brief and (2) to answer appellee's misconceived arguments on the law.

I

THE FACTS PROVED AT TRIAL

A. The Dispute Between *Taxi Weekly* and the Fleet Owners

Resorting to Biblical history rather than to the facts in the record, appellee contends that in the Spring of 1964, for no apparent reason, the fleet owners "suddenly turned" on *Taxi Weekly* (Ans. Br. 6).* Appellee claims that the evidence did not show the existence of any dispute between *Taxi Weekly* and its primary readership (Ans. Br. 22).

The logical question, then, is why did the fleet owners withdraw their support from *Taxi Weekly?* The answer is in the record:

(i) After the close of plaintiff's direct evidence, the District Court stated: "It is conclusive that [Peterman] was *persona non grata,* otherwise [they] would not have done what you charged" (A960-1). Indeed, the Court had concluded: "*As of the spring of 1964, * * * back before the alleged conspiracy, the proof is overwhelming that there was a very serious dispute between Mr. Peterman and his clients, his main customers, the fleet owners*" (A728) (emphasis added).

(ii) Appellee pleaded in its complaint and set out to prove at trial that defendants "put pressure on *Taxi Weekly* to adhere to their view" (A10, 49). Why would

* References to "Ans. Br." are to appellee's brief and to "App. Br." are to appellant's main brief. References to "A" are to the joint appendix.

such "pressure" have been applied if there were no divergence of views?

(iii) Lester Peterman, owner and publisher of *Taxi Weekly*, testified that *before* the alleged conspiracy began, he was warned by his partner, Abraham Weisinger, who had more than 30 years experience in that business, that: "if *Taxi Weekly* didn't toe the line and do what the fleet owners wanted [they] would start a paper" (A255).

(iv) Peterman also testified that he and the fleet owners had differences not unlike those between the "Republicans" and "Democrats" (A181).

(v) In the Spring of 1964, once again *before* the alleged conspiracy began, Peterman "flatly refused" to publish the press release brought to him by the public relations officer for Metropolitan Taxicab Board of Trade ("MTBOT"), George McIntyre, stating the fleet owners' position in regard to the proposed fare increase (A271). Subsequently, the fleet owners took a full page ad in *Taxi Weekly* to convey their position (A269-72). Surely, this is clear proof of the gulf between *Taxi Weekly* and the fleet owners.

(vi) Finally, as to the issues in dispute, appellee does not even mention the issue of unionization of drivers, which the fleet owners opposed vigorously. On this issue, it was the feeling of the fleet owners that *Taxi Weekly* was "favoring labor against industry" (A180-1). Indeed, the complaint charged that the alleged conspiracy began because *Taxi Weekly* would not change its editorial policy with respect to the unionization drive (A10). Even Peterman admitted at trial that the rival newspaper started by MTBOT, *The New York Hackman*, "was primarily designed to fight the union" (A150).

The trial court was correct then, when, after all of plaintiff's proof on liability, it termed the evidence of the existence of a dispute between *Taxi Weekly* and the fleet owners "overwhelming" (A728) and "conclusive" (A960). The existence of the dispute affected not only appellee's case on liability, but also the basis for its damage computation.* That the Court later submitted this as an issue to the jury is inexplicable.

B. The Dispute Between Weisinger and Peterman

Appellee now asserts that the first Peterman heard of a dispute between Weisinger and himself was when Botwinick told him about it and that somehow appellants were responsible for Weisinger's institution of dissolution proceedings (Ans. Br. 6-7, 46). In short, according to appellee, "the dispute with Weisinger was no dispute at all" (*Id.* at 7).

At the conclusion of plaintiff's direct evidence, the trial court stated:

> "I do not recall one ounce of evidence from which this jury could decide that Weisinger was put up to this, or urged to do this, or induced to do so, or whatever you want to say by any of the defendants here" (A960).

The trial court noted that appellee's position "strains credibility", and represents "naivete beyond anything that I can imagine" (A961).

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* Proof of this "political" dispute underlying the cancellations negatives any inference of *anticompetitive* motivation. Moreover, Kobak admitted that the existence of such a dispute would adversely affect his valuation (A745).

It found that "the evidence is virtually conclusive that there was indeed a disagreement between Weisinger and Mr. Peterman" (*Id.*).

Weisinger, whose testimony is virtually ignored in appellee's brief, testified that he and Peterman "just could not see eye to eye" (A895).

Weisinger complained that *Taxi Weekly* under Peterman was losing business and not adequately serving the industry (A900-1).

Zeff, associate editor of *Taxi Weekly* under Weisinger, testified that there was such a dispute between Weisinger and Peterman over editorials and "general matters affecting *Taxi Weekly*" (A697-8).

In short, the dispute was undeniably proved. Once again, its existence undercuts not only appellee's case on liability, but its entire case on damages. It should never have been submitted as an issue to the jury.

C. The So-Called "Conspiracy"

Appellee concedes that its case on liability is based totally on circumstantial evidence (Ans. Br. 8, 46). In fact, the necessary "leap of faith" to support the existence of "conspiracy" is that a number of cancellations of subscriptions to *Taxi Weekly* occurred two days after a meeting in Botwinick's office and one day after a meeting of MTBOT (*Id.* at 7-8). But the minutes of these meetings (A1430-32), the *only* evidence with respect to them in the record, do not even mention *Taxi Weekly*, let alone supply a basis for a "fair inference" that appellants (or anyone else)

made a "decision * * * concerning *Taxi Weekly* at that time" (Ans. Br. 8).* No reasonable construction of these facts can raise any inference of a conspiracy on the part of appellants not only to cancel subscriptions to *Taxi Weekly*, but to coerce individual fleet owners to cancel as well.

Indeed, the evidence shows that the cancellations occurred over a six-month period and that, far from being coerced, were based on sound business reasons; among them *Taxi Weekly's* antagonism to the fleet owners' effort to stem unionization (*e.g.*, A180-1). That these reasons were sound is established conclusively by the fact that shortly thereafter, a rival newspaper, *The New York Hackman*, was founded, which, in the words of Peterman, "was primarily designed to fight the union" (A150).

D. The Coercion of Advertisers

Once again, the facts in the record fail to support the statements of appellee's brief. Preliminarily, appellee claims it proved that defendants circulated false rumors designed to cause advertisers to withdraw from *Taxi Weekly* (Ans. Br. 47). The rumor was that a person whom the fleet owners disliked intensely owned *Taxi Weekly*. There is no evidence in the record, and none cited in appellee's brief (*Id.*) to support the proposition that

* It is significant that the minutes of the meetings referred to by appellee indicate that they were actually meetings of the Independent Taxicab Owners Council and the United Taxi Owners Guild, named defendants herein, which the jury found not to be part of the alleged conspiracy (A1630). There was no testimony offered by appellee with respect to these minutes (A311-315), and as the trial court noted in its charge (A1137), there was "no evidence" that either took any action against *Taxi Weekly* "as a result of this meeting, or immediately following it."

the appellants had anything to do with originating or spreading that rumor (*Id.* at 15).* Indeed, in its trial brief (Record on Appeal, Item #27), appellee claimed that defendant Salvatore Baron, executive director of UTOG, who the jury found was *not* a co-conspirator (A1630), admitted that "he was responsible for the false rumors."

As for "pressure" applied to advertisers, Sailler of Chrysler testified: "There has never been anybody put pressure on me * * * as far as pressure, I didn't have any pressure" (A346); and that "there was no customer who demanded that we remove any advertising" (A356).

Pacewitz, of Chrysler's advertising agency (Ans. Br. 14-15), did not testify at trial in person or by deposition. Peterman, in a textbook example of double hearsay, testified that Pacewitz told him that he [Pacewitz] had heard "from the field or in New York" that Checker or Markin owned or controlled *Taxi Weekly* (A763).

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* Appellee claims that Chrysler's man "in the field", Sailler, was told by Murstein and "other people" that Checker was involved with *Taxi Weekly*. Sailler's actual testimony at trial was:

> "Q. Do you recall what Mr. Murstein said about Mr. Peterman or about Taxi Weekly?
>
> * * *
>
> The Witness: Well, apparently they felt that Peterman was supporting the Checker taxicab, and of course, they had become a little unhappy about that.
>
> Q. That made you unhappy, sir? A. No. I said Murstein, when he felt that Peterman was supporting the Checker taxicab, he was unhappy because nobody wanted anybody to have a monopoly on the cab business in New York.
>
> Q. *Do you recall whether he told you what evidence he had that Checker was backing Peterman?* A. *No.*
>
> Q. *Did you pass that information on to any of your superiors?* A. *No*" (A340-1) (emphasis added).

Moore and Ulrich of Rockwell denied being pressured. Moore testified unequivocally at trial that he had "nothing to do with advertising and wasn't even consulted about it" (A380). At his deposition, on which appellee relies so strongly, Moore testified:

> "Q. Customers of Rockwell ask[ed] you to take away advertising from Taxi Weekly? A. As far as I can remember, no" (A381).

Finally, Moore's superior, Ulrich, testified on deposition:

> "Q. Did any persons whatsoever, I have just mentioned taxi fleet owners or their representatives, do you recall that any person or persons requested you through Glen Moore on any occasion to discontinue or cut down your advertising in Taxi Weekly? A. I don't recall anything like that.
>
> Q. Well, you say you don't recall. Do you deny there were any such conversations or are you just saying that you just don't have any recollection? A. I would deny it" (A905-6).

Thus, examination of the entire record shows that the evidence of "coercion" which appellee terms "direct, unequivocal" and "never contradicted, explained or denied in any way" (Ans. Br. 43) was repudiated by the very witnesses upon which appellee relies.

E. *Taxi Age* and the False Affidavits

Appellee hardly acknowledges the existence of *Taxi Age*, whose disclosure mid-trial almost caused a mistrial (A748-51), and tries to minimize the impact of its admitted violation of postal regulations and misstatement of circulation

figures by denying that this occurred, or by stating it was done with "permission of the Post Office" (Ans. Br. 24). The facts are *Taxi Weekly* submitted affidavits to the Post Office in 1962, 1963, 1964 and 1965 that contained false figures as to its circulation (A1609-11).* At the opening of the trial, appellee represented that the average circulation of *Taxi Weekly* was approximately 11,000 (A45). In fact, these affidavits show that *Taxi Weekly* had a circulation in those years of approximately 6,000 (A850, 1609). The remaining approximately 5,000 were copies of *Taxi Age*, an identical newspaper, except for a different masthead, which was distributed free (A813, 834-5).

At trial, appellee sought to recover damages for injury to *Taxi Weekly* based on *Taxi Weekly's* alleged circulation of 11,000. The existence of *Taxi Age* was never mentioned by appellee, and its circulation was silently included in *Taxi Weekly's* total. For the Post Office, however, in order to retain preferential mailing privileges for *Taxi Weekly*, appellee listed only the circulation of *Taxi Weekly*. Under the Postal Regulations, it could only do this if the two were distinct publications. As Peterman was forced to admit at trial: "the statements in that affidavit were not true" (A868).

As for the filing of these false affidavits with the "permission" of the Post Office, Peterman testified that the Post Office "instructed" him to consider *Taxi Weekly* and *Taxi Age* separately, but that he could not identify the person or state what he looked like or how many times he

* The 1964 affidavit appears in the October 12, 1964 issue of *Taxi Weekly*, part of the bulky bound volume which was plaintiff's exhibit 1.

spoke to him. After the trial court questioned Peterman as to the ground of this "permission", he replied "I am not positive. I believe it may have been to me, but it also may have been several times to other people" (A849).

These convenient omissions of fact by appellee, which substantially affect the damage award, are, as we have demonstrated, entirely consistent with its cavalier approach to the record in its brief.

II

THERE IS NO JURISDICTION.*

Appellee seeks to overcome the clear defects in the finding of jurisdiction by the trial court through a misconstruction of the decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) coupled with a factual *non sequitur* premised on nonexistent record proof.

According to appellee (Ans. Br. 35-6), *Goldfarb* stands for the proposition that a local conspiracy directed at a newspaper which publishes advertising of products sold interstate, without more, establishes federal jurisdiction under the Sherman Act by satisfaction of the quantitative "affecting commerce" test (Ans. Br. 32-6). Hence, it argues, the demise of Taxi Weekly, Inc. "substantially affected" interstate commerce for purposes of federal jurisdiction because automobile manufacturers sold mil-

* Appellee's argument as to this Court's jurisdiction to entertain this appeal is now moot. On May 18, 1976, the District Court, pursuant to Rule 4(a) of the Rules of Appellate Procedure, extended the time to file a notice of appeal to June 2, 1976, and a second notice was filed on May 19, 1976.

lions of dollars worth of cars in New York. The error of this facile construction of *Goldfarb* is belied by the very language quoted by appellee, which, upon examination, reveals that *Goldfarb* is further support for appellants' analysis of *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (App. Br. 20-3).

In *Goldfarb* the Court ruled that a price-fixing arrangement applied to title examinations pursuant to sales of homes financed by interstate funds was within the jurisdictional ambit of the Sherman Act. The result was predicated on two conditions conspicuously absent from the case at bar:

(1) the Court found, as a matter of law, that local title examinations were "integral" to interstate realty purchases, because as a matter of fact, "in financing realty purchases lenders require 'as a condition of making the loan, that the title to the property involved be examined'." 421 U.S. at 783; and

(2) the restraint of trade at issue in *Goldfarb* was imposed directly upon the local activity deemed to be "integral" to interstate commerce in that fees for title examinations by attorneys were fixed by the state bar association.

Given these two factors, the Court held that jurisdiction was present since defendants' acts were "in commerce". As the Court stated:

> "It would be more apt to compare the legal services here with a taxi trip between stations to change trains in the midst of an interstate journey. In *Yellow Cab*

> we held that such a trip was a part of the *stream of commerce* * * *'' *Id.*, at 785, n. 13 (emphasis added).

Goldfarb is, then, entirely consistent with *Lorain Journal*, but not as appellee would have it. The plain ''jurisdictional consequence'' of both cases is that a restraint imposed upon a local activity which as a matter of fact is found to be integral to the stream of interstate commerce occurs ''in commerce'' and, therefore, the *qualitative* ''in commerce'' test is satisfied. Contrary to appellee's assertion (Ans. Br. 36-7), neither *Goldfarb* nor *Lorain Journal* purports to eradicate the quantitative ''affecting commerce'' jurisdictional standard, which is not satisfied simply because a newspaper publishes advertisements for products sold interstate.

Any doubts as to appellee's misplaced reliance on *Goldfarb* to sustain ''affecting commerce'' jurisdiction in the instant case are dispelled by the thorough construction of *Goldfarb* in the recent *Sapp* v. *Jacobs*, 408 F. Supp. 119 (S.D. Ill. 1976). In dismissing the complaint for lack of jurisdiction, the court rejected plaintiff's reliance on *Goldfarb* to create federal jurisdiction over defendant's alleged conspiracy to prevent plaintiff from developing a shopping mall. *Goldfarb* was held to have applied an ''in commerce'' test to the title examination at issue. Citing the Supreme Court's reference to the ''inseparability of this particular legal service'' from the interstate real estate transactions, the *Sapp* court determined that in *Goldfarb* the minimum fee schedules were ''held [to be] 'in' interstate commerce'' and hence a proper foundation for jurisdiction. 408 F. Supp. at 126-7.

Indeed, comparison of the essential facts in *Goldfarb* and this case serves to emphasize that there was no jurisdiction below. Unlike the local title examination in *Goldfarb*, the only "proof" that *Taxi Weekly's* local advertising was an "integral" part of interstate commerce is appellee's unsupported claim that the record "demonstrates that *Taxi Weekly* advertising played an integral part in interstate sales of products valued at more than $12.5 million" (Ans. Br. 35). There is not a single record reference provided. In fact, there is no proof whatever in the record that *Taxi Weekly* advertising played an integral part, or any part, in a single interstate transaction involving products advertised.

Moreover, the second essential feature of *Goldfarb*, the direct restraint applied to interstate commerce, is similarly absent here. The trial court refused appellee's request to make such a finding (A1200); instead, it expressly sustained jurisdiction solely on an "affecting commerce" theory so that it could not be said that "there is an issue of fact which should have gone to the jury" (A1198).* In short, *Goldfarb* does not save appellee from the conclusion compelled by all the controlling authorities cited in appellants' brief (19-29)—that the demise of *Taxi Weekly* had an effect on interstate commerce that as a matter of law was *de minimis*.

The weakness of appellee's position on jurisdiction is underscored by its resort to reliance on news clippings

* Despite appellee's assertion that appellants consented to the Court's having determined jurisdiction (Ans. Br. 30), the record is clear that at each stage appellants requested the Court to submit the issue to the jury, and objected to the trial court's refusal to do so (A757, 1316, 1322).

acquired from out-of-state, the 100-200 copies of *Taxi Weekly* sent outside New York, and the interstate aspects of the monthly magazine, *Taxi Industry/Auto Rental News*, to support a finding of jurisdiction (Ans. Br. 37-42).

Appellants have already demonstrated that authorities such as *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964), *Page* v. *Work*, 240 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961) and *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) preclude a finding of jurisdiction based on incidental interstate contacts. In addition, there was no proof introduced as to how much commerce, in dollar volume, was represented by such purchases. Indeed, Peterman didn't even know if any of the copies of *Taxi Weekly* sent outside New York were ever paid for by the recipients (A1356). Appellants have shown that cases such as *Uniform Oil Co.* v. *Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968) and *Harlem River Consumers Coop., Inc.* v. *Retail, Wholesale & Chain Store Food Employees Union, et al.*, 1976-1 Trade Cas. ¶60,819 (S.D.N.Y. 1976) make quantitative proof of effect on commerce a prerequisite to satisfaction of the quantitative "affecting commerce" jurisdictional test.

In a last gasp effort to sustain jurisdiction, appellee devotes four pages of its brief (38-42) to the interstate character of *Taxi Industry*, appellee's monthly magazine. It is sufficient to note that appellee in the same brief asserts that publication of *Taxi Industry* was unaffected by appellants' cancellations of *Taxi Weekly* subscriptions (Ans. Br.

11). Furthermore, when appellee sought to introduce evidence as to the monthly, the trial court stated:

> "I don't imagine we would be sustaining interstate commerce solely on the basis of *Taxicab Industry* * * * I don't want you to be prejudiced on your record, but I think frankly, we are going pretty far afield when we go into the magazine" (A1181).

Finally, appellee asserts (Ans. Br. 43-4) that the alleged conspiracy was "in commerce" because there was "proof" of pressure on interstate advertisers, therefore satisfying the qualitative test which appellants submit was adjudicated in *Goldfarb* and *Lorain Journal*. Appellants reiterate that the "evidence" of such "pressure" was twice repudiated by appellee's own witnesses, both at deposition and at trial. More importantly, however, the trial court, which was the trier of fact on the issue of jurisdiction, declined to base its ruling on this ground, and predicated its ruling solely on an effect on commerce derived from the alleged conspiracy (A1414).

Nothing in appellee's brief mitigates the necessary conclusion of the authorities collected in appellants' brief. The holding in *Goldfarb* merely reinforces the clear mandate of those cases. There was no interstate commerce jurisdiction established in the instant case, and the judgment must therefore be reversed and the complaint dismissed.

III

NO ANTITRUST VIOLATION WAS ESTABLISHED.

Point II of appellants' main brief demonstrates that appellee failed to establish the essential elements of a claim under the Sherman Act. Appellee has now effectively conceded this issue, by asserting that, at most, it established facts from which an inference could be drawn that appellants conspired with the intent to destroy appellee's business (Ans. Br. 45-6). But the authorities are clear that injury to *competitive market relationships,* in purpose and effect, is the *sine qua non* of an antitrust violation. Therefore, the cases uniformly hold that, without more, even clear proof of a conspiracy to destroy a business does not constitute a violation of the Sherman Act.

The issue on appeal is whether this case should have been presented to the jury. Appellants contend that the trial court erred, *as a matter of law* when it concluded, *as a matter of law,* that appellee had established a *prima facie* case under the Sherman Act, and denied appellants' motions for a directed verdict. The court's error is plain from the theory of appellee's complaint, the evidence appellee adduced at trial, and the court's own conclusion at the close of plaintiff's case as to what was proved.

Appellee alleged in its complaint and proved at trial that appellants cancelled their *Taxi Weekly* subscriptions because of a "political" dispute with the newspaper, *i.e.,* a divergence between the parties' positions on the issues of unionization (curiously unmentioned in appellee's brief)

and a fare increase. The trial court found appellee's own proof in this regard to be "overwhelming" (A728) and "conclusive" (A960).*

This fact, coupled with the complete failure of proof by appellee linking the alleged conspiracy to any effect on competitive market relationships, entitled appellants to a directed verdict at the close of appellee's case.

Appellee seeks to avoid this result by contending that it proved a conspiracy which went "beyond the mere cutting off of subscriptions" to include "purposeful activity designed to injure or destroy plaintiff's business" (Ans. Br. 48). In so stating, appellee defeats its claim under the Sherman Act, and merely emphasizes the error of the Court below.

In the first place, appellee admits that the only direct evidence of conspiracy adduced was the cancellation of subscriptions by several MTBOT members on the same date (Ans. Br. 45-6). Of course, such evidence alone is inadequate to sustain a conspiracy in violation of the Sherman Act. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968); *Modern Home Institute, Inc.* v. *Hartford Acc. & Ind. Co.*, 513 F.2d 102 (2d Cir. 1975); *Kraeger* v. *General Electric Co.*, 497 F.2d 468 (2d Cir. 1975). In *Kraeger*, where the only proof plaintiff could marshal was identical to that adduced by appellee, this Court held:

* See pp. 2-3, *supra*. Appellee asserts that the trial court changed its mind after *all* the evidence was in (Ans. Br. 5, n.). Since appellants put in no case as to liability, one wonders what "proof" could have dissuaded the court from that which was "conclusive" at the close of appellee's direct case.

> "With respect to the conspiracy claims * * * the only evidence offered by [plaintiff] in support of such claims was the coincidence of the dates of defendants' rejection of Kraeger's proposals. Such parallel business behavior, without more, does not establish an illegal agreement in violation of the Sherman Act." 497 F.2d at 471.

However, assuming *arguendo* that there were a "conspiracy," and assuming further what appellee now asserts but did not prove at trial, that appellants intended to destroy *Taxi Weekly*,* no conduct prohibited by the Sherman Act has occurred.

Imputing a tortious motive to appellants cannot create an antitrust violation. Malicious motive cannot convert an act otherwise lawful under the antitrust laws into a violation of the Sherman Act. In *Hunt* v. *Crumboch*, 325 U.S. 821 (1945), defendants conspired to boycott plaintiff with the specific intent to destroy plaintiff's business because defendants thought plaintiff had killed a union member during a strike. Plaintiffs' attempt to base an antitrust claim on such fact was, however, dismissed. Affirming the dismissal, the Supreme Court noted that union members were free to concertedly withhold their services from plaintiff without violating the Sherman Act. The additional element of maliciousness was held not to create an antitrust violation of the free exercise of recognized labor rights. The Court emphatically rejected plaintiff's

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* The trial court found the evidence "conclusive" that appellants abandoned *Taxi Weekly* for "political" reasons (A960). That appellants offered no live witnesses at trial is hardly surprising given the trial court's statement that plaintiff's proof as to the existence of a dispute was "overwhelming" (A728). When a *prima facie* case is not made out by plaintiff, defendant has no obligation to come forward in rebuttal.

contention that the boycott fell "within the condemnation of the Sherman Act, because the union members' refusal to accept employment was due to personal antagonism against petitioner arising out of the killing of a union man." 325 U.S. at 824.

In the case at bar, the Court below determined that appellants were free to exercise constitutional rights by cancelling *Taxi Weekly* subscriptions in concert, given their dissatisfaction with its editorial views (A1115-6). *Hunt* makes clear that allegations and proof of a motive to destroy *Taxi Weekly* cannot attach antitrust liability to those acts. As stated in *Hunt*:

> "[T]he controversy in the instant case, between a union and an employer, involves nothing more than a dispute over employment * * * It cannot, therefore, be said to violate the Sherman Act * * * *That Act does not purport to afford remedies for all torts.* * * *" 325 U.S. at 826 (emphasis added).

Similarly, in *Ace Beer Distribs. Inc.* v. *Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963) plaintiff's exclusive distributorship was terminated pursuant to a conspiracy allegedly motivated by a malicious attempt to destroy plaintiff's business, including the pirating of plaintiff's employees. Nevertheless, the court refused to find a violation of the Sherman Act absent proof that suppression of *competition* resulted. 318 F.2d at 287 (emphasis added).

An attempt to destroy plaintiff was also alleged in *Parmelee Transp. Co.* v. *Keeshin*, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961). The means employed were the procurement of a lawful transportation monopoly,

which did in fact destroy plaintiff's business, through the corruption of a public official. The court affirmed dismissal of the Sherman Act claim. Its rationale is significant in the instant case:

> "[T]he use of conventional anti-trust language * * * will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state laws. * * * The *anti-trust laws were never meant to be a panacea for all wrongs.*" 292 F.2d at 804 (emphasis added).

See also: *Walker Distrib. Co.* v. *Lucky Lager Brewing Co.*, 323 F.2d 1, 5, n.1 (9th Cir. 1963); *Industrial Bldg. Materials, Inc.* v. *Interchemical Corp.*, 278 F. Supp. 938, 959 (C.D. Cal. 1967), *rev'd on other grounds*, 437 F.2d 1337 (9th Cir. 1970); *A-1 Business Machines Co.* v. *Underwood Corp.*, 216 F. Supp. 36, 37 (E.D. Pa. 1963).*

Hence, contrary to appellee's contention that the Sherman Act's embrace is all-inclusive, the antitrust laws do not, under any authority, extend to "private quarrels" (Ans. Br. 48) that have no competitive consequences.**

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* Appellee's failure to prove a claim cognizable under the Sherman Act also defeats its cause of action under New York's Donnelly Act. Except for impact on interstate commerce, the standards of proof under both acts are similar. The Donnelly Act is *antitrust* legislation prohibiting monopolies and restraints on competition. It is not a general prohibition of all business torts. *Columbia Gas of New York, Inc.* v. *New York State Elec. & Gas Corp.*, 28 N.Y. 2d 117 (1971); *In re Davis*, 168 N.Y. 89 (1901).

** Appellee cites *Klor's Inc.* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959) for their overbroad construction of the Sherman Act. *Klor's* actually confirms *appellants'* position, for it rests on the threat to competition in the market for retail sales posed by the fact that the victim was a competitor of a principal conspirator in that market. *See, E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178, 186-7 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

Admitting the inadequacy of ts proof, appellee's brief highlights the trial court's error in permitting this case to go to the jury.

Appellee seeks to distinguish cases such as *Ace Beer, supra*, on the grounds that *Taxi Weekly* was not a "house organ", but an independent competitive entity. The record is, however, unequivocally to the contrary. Appellee admits that the fleet owners represented "the great bulk" of its circulation revenues, and its advertising was heavily dependent on its circulation. In fact, the fleet owners accounted for two-thirds of its circulation (A45). Moreover, Peterman was warned by Weisinger (who started and guided *Taxi Weekly* for 30 years, and whose testimony is virtually ignored in appellee's brief), long before the alleged conspiracy, that failure to adhere to the fleet point of view would result in alienation of the fleet patronage (A255). Appellee's proof that such alienation did occur precisely because Peterman failed to heed Weisinger's advice, and for precisely the predicted reasons, was deemed "overwhelming" (A728) and "conclusive" by the trial court (A960). Indeed, since Peterman announced that *Taxi Weekly* became "the completely independent taxi newspaper", the logical question is: from whom did it gain its independence if not from the fleet owners, who had withdrawn their support? It is appellee's own proof which gives the lie to the posture it now seeks to adopt in its brief, that *Taxi Weekly* was always independent of the fleet owners. The authorities cited in Point II of appellants' brief are thus all directly applicable to the case at bar.

The inescapable conclusion remains that Taxi Weekly, Inc. failed at trial to prove the essential elements of a

claim under the Sherman Act, and cannot point to any such evidence in its brief. Thus, the judgment below must be reversed and the complaint dismissed.

IV

THE DAMAGE AWARD CANNOT STAND.

Appellee blithely contends that "it would be impossible to conclude that the facts on which Kobak [its expert] based his testimony 'have been proved by undisputed evidence to be untrue' " (Ans. Br. 56). As appellee puts it, "the affirmative evidence offered by plaintiff, coupled with defendants' failure to testify" provided the facts to support appellee's expert's opinion (*Id.*).

What were these facts?:

(i) There was a dispute between the owners of Taxi Weekly, Inc.—Weisinger so testified and the trial court termed Peterman's denials "just *impossible* to believe" (A961);

(ii) *Taxi Weekly* had alienated its primary clientele, the fleet owners—Peterman testified that the differences between them were like those separating "Republicans" and "Democrats" (A181), and the trial court concluded that evidence that a "very serious dispute" existed prior to the alleged conspiracy was "overwhelming" (A728);

(iii) *Taxi Weekly's* circulation figures given by appellee to its expert were false—Peterman expressly admitted this, and at the same time admitted that *Taxi Weekly* had violated Post Office regulations by filing false affidavits; and

(iv) Appellee's federal and state tax returns showed salaries for Peterman and Weisinger of approximately $50,000 per year.

Kobak admitted that he did not take items (i), (ii) and (iii) into account in valuing appellee. Kobak downgraded the importance of item (i). He conceded, however, that items (ii) and (iii), if proved—as clearly they were—would have an "effect" on his valuation (A745), obviously to lower it. As for item (iv), Kobak simply dismissed it, ignoring that although appellee may not have had to allocate as between salary and profit for its officers, *it chose to do so*, and offered no explanation at trial to contradict the declarations made "under penalty of perjury," in the tax returns (A1506).

The actual facts, then, based on plaintiff's testimony, completely undercut, rather than support, the assumptions on which Kobak's opinion was based.

As for return on capital, trial counsel's alleged concession that it is irrelevant is not supported by the record. Certainly, the capital investment in office furniture is not determinative of value, which trial counsel recognized (A 597-80, 596). The purchase price paid by Peterman to acquire the corporation, however, must be an admission of its worth on the market. Even under Kobak's theory, use of a multiple of earnings to determine a "going concern value" is designed to reflect the expected rate of return a purchaser would hope to receive on his capital investment, *i.e.*, the purchase price of an ownership interest (A526-30).

Peterman had received a rate of return of 7% on his "pre-conspiracy" one-half interest investment (App. Br.

45, n.). This rate of return would fall to less than one percent (0.88%) for any purchaser who paid Kobak's price, $250,000, for Taxi Weekly, Inc.*

Accordingly, the damage award cannot stand.

Conclusion

For all of the foregoing, appellants respectfully submit that the judgment must be reversed and vacated and the complaint dismissed, or in the alternative, that the judgment should be vacated and the action remanded to the District Court for a new trial on damages and a recomputation of attorneys' fees.

Respectfully submitted,

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* A one-half interest investment would cost $125,000 under Kobak's theory and entitle the one-half owner to share in profits at a "pre-conspiracy" rate of $1,100.

Service of 2 copies of the within Brief is hereby admitted this 20th day of May 1976

Signed Alan R. Wentzel

Attorney for Appellee

Service of 2 copies of the within Brief is hereby admitted this 20th day of May 1976

Signed

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